MAY 19 1954
HAROLD B. WILLEY, Clerk

In the

Supreme Court of the United States

OCTOBER TERM, 1954

No. [redacted]83

THE HOUSING AUTHORITY OF THE CITY OF DALLAS,
Petitioner,

v.

EDDIE THOMAS, *et ux.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS AND BRIEF IN SUPPORT THEREOF

H. P. KUCERA,
402 City Hall,
Dallas, Texas,
City Attorney of the City of Dallas,
Counsel for Petitioner.

SCURRY, SCURRY & PACE,
Of Counsel.

WARLICK LAW PRINTING CO. - LAW BRIEF PRINTING - DALLAS - HARWOOD 9350

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To the Honorable Supreme Court of the United States:

Your petitioner is: The Housing Authority of the City of Dallas, a municipal corporation created under and by virtue of Article 1269K, Vernon's Texas Civil Statutes, with its principal place of business in Dallas, Dallas County, Texas.

Respondents are: Eddie Thomas and wife, private citizens, domiciled within Dallas County, Texas.

Petitioner respectfully shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED

Petitioner instituted eminent domain proceedings in the County Court at Law No. 1, Dallas County, Texas, under and by virtue of Articles 3264, et seq., of the 1925 Revised Texas Civil Statutes for the purpose of acquiring the real estate owned by the Respondents within Dallas County, for a low income public housing project authorized under the Federal Statutes, particularly U. S. Housing Act of 1937, Public Law 412, 75th Congress, 50 Statutes 888, 42 U.S.C. Sec. 1401, et. seq., as amended by the Housing Act of 1949 Public Law 171, 81st Congress, 63 Statutes 413, 42 U. S. C. 1401, et seq., consisting of thirty-five hundred units. Under Article 3264, 1925 R. C. S. a condemnation board was appointed and after a hearing, made an award to the said Eddie Thomas and wife, in the amount of $2,775.00 as the value of the property taken. Within ten (10) days' time as provided by statute, Eddie Thomas and wife filed their appeal claiming the award as insufficient. On the 17th day of July, 1951, the Housing Authority of the City of Dallas, desiring to take immediate possession of the property, deposited into the registry of the court the amount of the award as provided by Article 3268, 1925 R. C. S., and took possession. On the 31st day of July, 1951, Respondent filed a motion and an affidavit with the Judge of County Court at Law No. 1 in which he sought to withdraw the amount of money deposited, which the court permitted to be done. (R. 16.) On the 24th day of September, 1952, Petitioner

was granted a Summary Judgment (R. 20) in said cause, because the Respondent had withdrawn the amount of the award from the registry of the court, which made the question of sufficiency of the award moot, and that Respondents accepted the amount of the award as full satisfaction of the amount due for the property taken under the eminent domain proceedings. Respondents prosecuted an appeal to the Court of Civil Appeals of the 11th District of Texas sitting at Eastland, Texas, where judgment of the trial court holding the question to be moot was affirmed. (See opinion, *Eddie Thomas, et al. v. The Housing Authority of the City of Dallas, 258 S. W. 2d 428.)*

Upon application of Respondents, the Supreme Court of Texas granted a Writ of Error, and rendered a judgment reversing the judgment of the two inferior courts, and held that the question was not moot and that Respondents had the right to withdraw the money from the registry of the court and still prosecute their appeal. (See opinion of the Supreme Court, *Thomas v. The Housing Authority of the City of Dallas, 264 S. W. 2d 93.* Opinion was rendered December 16, 1953.) (R. 25.)

Petitioner in its Motion for Rehearing for the first time raised the federal question involved. (R. 30.) The motion was overruled by the Supreme Court of Texas on the 24th of February, 1954. (R. 61.)

This suit is one of thirty (30) similar suits, in which the Petitioner is plaintiff, which are now pending in the trial courts of Dallas County, Texas. (R. 36.)

JURISDICTIONAL STATEMENT

This Honorable Court has jurisdiction under Section 1257(3) of Title 28 of the United States Judicial Code because:

> (a) The interpretation placed upon Article 3268, Revised Texas Civil Statutes 1925, as amended, operates to deprive petitioner of property without due process of law, contrary to the Fourteenth Amendment of the United States Constitution, because such an interpretation of the statute denies to the condemnor equal protection of the law and grants unequal privileges, rights and remedies to condemnee not enjoyed by the condemnor.

Article 3268, Revised Texas Civil Statutes 1925, as amended, reads as follows:

Art. 3268. 6530, 4471, 4205 Damages Paid First.

If the plaintiff in the condemnation proceedings should desire to enter upon and take possession of the property sought to be condemned, pending litigation, it may do so at any time after the award of the commissioners, upon the following conditions, to-wit:

1. It shall pay to the defendant the amount of damages awarded or adjudged against it by the commissioners, or deposit the same in money in court, subject to the order of the defendant, and also pay the costs awarded against it.

2. In addition thereto, it shall deposit in said Court a further sum of money equal to the amount of the damages awarded by the Commissioners, and which shall be held, together with the award itself, should it be deposited in Court instead of being paid, exclusively to secure all damages that may be awarded or adjudged against the plaintiff; and it shall also execute a bond with two or more good and solvent sureties, to be approved by the Judge of the Court in which such condemnation proceedings are pending, conditioned for the payment of any further costs that may be adjudged against it, either in the Court below or upon appeal. The State, a county, municipal corporation, irrigation district, water improvement district or water power control district created under authority of law, shall not be required to deposit a bond or the amount equal to the award of damages by the Commissioners as provided in Section 2 hereof. As amended Acts 1930, 41st Leg., 4th C. S., p. 75, ch. 37 § 1; Acts 1934, 43rd Leg., 2nd C. S., p. 89, ch. 37 § 2.

3. Should it be determined on final decision of the case that the right to condemn the property in question does not exist, the plaintiff shall surrender possession thereof, if it has taken possession pending litigation, and the court shall so adjudge and order a writ of possession for the property in favor of the defendant, and the court may also inquire what damages, if any, have been suffered by the defendant by reason of the temporary possession of the plaintiff, and order the same paid out of the award or other money deposited; provided, that in any case where

the award paid the defendant or appropriated by him exceeds the value of the property as determined by the final judgment, the court shall adjudge the excess to be returned to the plaintiff.

If the cause should be appealed from the decision of the county court, the appeal shall be governed by the law governing appeals in other cases; except the judgment of the county court shall not be suspended thereby. Const. Art. 1, Sec. 17; Acts 1899, p. 105.

(b) The construction placed upon Article 3268, Revised Texas Civil Statutes, 1925, as amended, which brings about the above result is not a necessary construction of the statute, but is the result of misconception of the language with a total disregard of the mutual rights and remedies of the parties to an eminent domain proceedings.

(c) If the interpretation placed upon the statute is the only and necessary interpretation, then such statute is invalid and results in the denial of due process and equal protection to the petitioner, contrary to the Fourteenth Amendment of the United States Constitution.

(d) Since the petitioner, a municipal corporation, organized under the laws of the State of Texas, operates with federal funds advanced to it by a public agency of the United States Government under authority of U. S. Housing Act of 1937 as thereafter

amended, the interpretation of the statute, as placed upon it by the Supreme Court of Texas places in jeopardy federal funds and will materially increase the cost of the so-called low-rent Federal Housing Projects in Texas.

FEDERAL QUESTIONS PRESENTED

1.

It is specifically urged that the Petitioner, as a result of the decision of the Supreme Court of Texas, has been denied equal protection of the law in that the rights and remedies of the parties to this suit are not equal and do not guarantee both parties the same rights and privileges.

2.

Article 3268 of the Revised 1925 Texas Civil Statutes, the basis of this suit, has been construed by the Supreme Court of Texas in such a way as to render the results violative of equal protection and due process of the law to the condemning party, because such an interpretation of the statute as made is not necessary.

3.

In the alternative if such a construction of the statute is necessary, then the validity of the eminent domain statute, particularly Article 3268 of the Revised 1925 Texas Civil Statutes, is drawn in question because if the statute requires such an interpretation, then it results in the denial of equal protection to the parties and deprives the con-

demnor of property without due process of law. The sole and only purpose of Article 3268, Revised 1925 Texas Civil Statutes, as amended, was to implement the constitutional means under which the condemnor could go into possession pending final litigation. However, the court has placed an interpretation on the statute, and if such interpretation is correct, then the result is repugnant to the Fourteenth Amendment of the United States Constitution in that it deprives the condemnor of property without due process of law. Therefore, the statute, as construed by the Supreme Court of Texas, is invalid.

4.

Article 1, Section 17 of the Texas Constitution provides that:

> "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the state, such compensation shall be first made, or secured by a deposit of money;"

If Article 3268, Revised 1925 Texas Civil Statutes, is correctly construed by the Supreme Court of Texas, which gives the right to the condemnee to withdraw the security placed into the court and continue to litigate for more, then such statute not only violates the Texas Constitution, but applies unequally to the parties to the litigation contrary to the provisions of the Fourteenth Amendment of the United States Constitution.

5.

Since the various Housing Authorities in the State of Texas and elsewhere operate with federal funds advanced to them by an agency of the United States Government, the construction placed upon the statute by the Supreme Court of Texas places in jeopardy federal funds, which will be lost and will increase the cost of low-rent Housing Projects in Texas if the judgment of the Supreme Court of Texas is permitted to stand in this case, because:

(1) In the event the award is reduced by the jury in the County Court and the condemnee has withdrawn the security and wasted it, the condemnor will have no way of recovering the *excess* except by a general judgment against a person who may or may not be solvent.

(2) It will encourage litigation or foment litigation on the part of the condemnee and cause the condemnors unnecessary expense and waste, and cause them to pay more for property taken than is required by Article 1, Section 17 of the Texas Constitution and by the Fourteenth Amendment of the United States Constitution.

6.

That the construction placed on Article 3268, 1925 R. C. S., as amended, does not apply equally and secure equal rights and remedies, and thus violates both the Texas and the Federal Constitution, becomes apparent when we con-

sider that the Texas courts have held that the title to property involved in eminent domain proceedings cannot be divested out of the owner unless and until the adjudged amount finally due and payable has been paid.

7.

Since an eminent domain proceedings statute, which provides that the property owner will get paid for his property by a general judgment without further security, does not meet the requisite of Art. 1, Sec. 17 of the Texas Constitution and has therefore been declared void *(B. B. B. Ry. Co. v. Ferris, 26 Tex. 588)*, does it not follow that the present statute is void if by judicial construction it puts the condemnor to that kind of a remedy to recover any excess deposit, or the entire deposit in the event of abandonment of the condemnation or in the event the right to condemn does not exist in favor of condemnor?

8.

That in the event the deposit made is insufficient to cover the judgment finally awarded as the value of the property, the trial court is powerless to make the decree divesting the property owner of title until the amount is paid and that he has a lien on such property to secure the payment, which can be enforced by execution, without securing to the condemnor the absolute right to recover any excess deposited, violates the due process clause of the United States Constitution.

9.

Does the judgment of the Supreme Court of Texas deny the Petitioner equal protection of the law, as between the litigants in an eminent domain proceeding, by holding that the property owner, after the award is made and deposited into the registry of the court so that the condemnor may take immediate possession of the premises, may withdraw the money, waste it, and then still litigate over the value thereof, and in the event the judgment is reduced, the condemnor will have only a general judgment against an insolvent party?

10.

Since under the decisions of the Supreme Court of Texas and the United States Supreme Court, an eminent domain proceeding is a proceeding in rem and whenever the award (money) is deposited into the registry of the court so that the condemnor may take immediate possession, the money represents the res, and if the Respondent is given the right to take it regardless of whether the amount of the award is exorbitant or insufficient and still litigate the matter, as held by the Supreme Court of Texas, is the statute or the judicial construction thereof violative of the Fourteenth Amendment of the United States Constitution by putting the condemnor in the position of having to litigate an empty shell for the reason that it will have only a general judgment for the excess deposit, which may not be enforceable or collectible due to insolvency of condemnee, and thus put

the condemnee in a favored position as against that of the condemnor.

11.

Since the Petitioner, The Housing Authority of the City of Dallas, operates with funds appropriated by Congress and with the proceeds of loans guaranteed by a Federal Agency under the Act of Congress and such monies are advanced to The Housing Authority, which it in turn uses to make these deposits in order to take immediate possession of the premises and proceed with the construction of the improvement, the funds of the United States Government are placed in jeopardy by permitting the condemnee to withdraw the subject matter of litigation and still litigate over its value, which action is repugnant to public policy, and likewise amounts to a denial of equal protection of the litigants under the Texas law in eminent domain proceedings, as construed by the Supreme Court of Texas.

12.

Eminent domain statutes of Texas have been construed by our Texas courts uniformly for many years, holding that the property owners could not withdraw the award of the commissioners from the registry of the court and still litigate the matter, and the Legislature has reenacted such statutes in the light of such decisions without change, and as such these decisions have become a rule of property, which the present opinion of the Supreme Court of Texas

destroys and puts the condemnor at the mercy and whim of dealing with a solvent or insolvent condemnee, thus denying equal rights and remedies to the condemnor.

13.

Since the eminent domain statute applies to the state and all political subdivisions and private corporations which have the power of eminent domain delegated to them by law, it is clear that since all of these public bodies and public service corporations necessarily handle either taxpayers money or trust funds, they are by this decision of the Supreme Court of Texas placed in a position of being denied equal protection of the law.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1.

Petitioner has been denied equal protection of the law in this case because the Supreme Court has sanctioned the following:

(a) The withdrawal of the security required to be deposited into the registry of the court to secure the payment for the property taken under eminent domain proceedings, Art. 1, Sec. 17 of the Texas Constitution.

(b) The Supreme Court of Texas has sanctioned the withdrawal of such security on an ex parte affidavit filed in the trial court. (R. 16.) A real estate man made the affidavit that the property subject of

condemnation was worth more than twice the amount of the award of the commissioners.

(c) The Court has sanctioned the withdrawal of the deposit which is the res of the litigation and has sanctioned the dissipation, wasting, and removal from the jurisdiction and control of the trial court the said subject matter of litigation and still permit the land owner (Respondent) to litigate over the value of the subject matter of the litigation after he had appropriated it to his own use.

(d) The Supreme Court of Texas has sanctioned the withdrawal of the money which has been paid into the court as security to insure payment when the litigation is completed and the final sum is adjudicated to be due, thus placing the Petitioner in the position of litigating a hopeless and fruitless cause because if it wins, it will have no assurance that it will get the money returned to satisfy its judgment; whereas, on the other hand, the Respondent or condemnee is given full assurance that he cannot be divested of title to his property until the condemnor actually pays him in cash at the time the divesture of title is made by the decree of the court.

Parenthetically the deposit of money into the registry of the court is not a partial tender, but if it is a tender, it is a tender in full satisfaction of the value and damages to the property taken. Thus, the court wholly ignored the main and sole purpose of Article

3268, R. C. S. 1925, and that is to give the condemning party right to immediate possession pending litigation.

The purpose of Art. 3268, R. C. S. 1925, is solely to enable the condemnor to go into immediate possession so that important public work be not delayed. Section 1 of said Article, which provides that the condemnor shall pay the amount of the award to the land owner or deposit the same into the registry of the court as security, simply means, under a long line of adjudicated cases, that if payment is made directly to the owner, that is the end of the litigation because the condemnor has paid for and purchased the property. However, if the land owner does not accept the money, the condemnor can pay the money into the registry of the court "to the order of the defendant," and thus get possession immediately, even during the ten-day period in which the land owner has to decide whether or not he will appeal from the award. When he appeals from the award, it is nullified and a trial de novo results with a trial as in other civil cases. (See Art. 3268, R. C. S. 1925.)

(e) The decision of the Court operates unequally from another standpoint. The Condemnee can withdraw the money (the deposit which Art. 1, Section 17 of the Texas Constitution requires to be made) and he gets the title to the money because it is spendable as legal tender even though it represents the res of the litigation. On the other hand the Condemnor does

not get title to anything and cannot get title until a final judgment of condemnation is entered subject of course to full payment of the final judgment.

(f) Where is there any equality of rights and remedies? Again, under established case law in Texas, the Condemnor has the legal right to abandon the condemnation but it must pay Condemnee any legal damages that he may have suffered either by dispossession or physical injury to land or improvements. If the land owner takes the deposit and is insolvent and the land subject to condemnation is a homestead, and therefore exempt from execution, then Condemnor has lost the money (the deposit). The legal effect is that Condemnor is deprived of the legal right to abandon the condemnation and if it takes the lands and does not use it for the purpose condemned, the land will revert back to the Condemnee. He will have his land and Condemnor's money and thus be unjustly enriched. Does the law operate equally on both parties?

(g) Still another case arises under this statute that follows under this holding by the Texas Supreme Court: In case the court holds that Plaintiff has no power to condemn and it had gone into possession, by making the deposit under Article 3268, the money deposited should be available to make restitution by way of damages for the detention, reasonable rental, physical damage to land or improvements. Under this decision, the land owner can take the deposit beyond the jurisdiction or control of the court and spend the

money freely. How will Condemnor be made whole in this case? Will a general judgment satisfy the 14th Amendment? Yes, it can get an offset on the damages, but it cannot get a lien on the homestead property to recover the balance.

The Supreme Court has heretofore awarded legal rate of interest on the total final award from date of dispossession and considered it as adequate compensation for the detention of the use of the property.

Prior to the *Thomas* decision Condemnor had the right:

1. To deposit award and take immediate possession and was obligated to pay interest on total final award. With the security deposit intact in the possession of the court as long as the landowner was appealing, it was assured that it would not suffer any loss by virtue of availing itself of the right to immediate possession.

2. It had the right to abandon condemnation and pay compensation for dispossession and damages to land and improvements, if any.

3. It was obligated in the event it was decided that the power of condemnation did not exist, to pay compensation for illegal dispossession with damages to land and improvements.

The Thomas decision now impairs each of the above rights by taking away its property without due process of law by granting to Condemnee the absolute right to appropriate the (deposit) money and relegate the Condemnor

to the precarious remedy of a general judgment to enforce its rights:

(1) To recover the excess of the deposit when the court or jury reduces the award.

(2) To recover a judgment against the Condemnee for the amount of the deposit less any offset for detention and damages, in the event of abandonment of condemnation by it.

(3) To recover a judgment against Condemnee for the amount of deposit less offset for illegal dispossession and damages to land and improvements, in the event it be declared without right to condemn.

Are these rights equal as between the Condemnor and Condemnee? Are these respective remedies against each other equally effective? Do these remedies afford equal protection of the law? Is not the Condemnor put in the position of being effectively deprived of property without due process of law? The answers are self evident.

It is believed that the rights and remedies of the parties to a litigation must be mutual in that the condemnor should be required to pay full and adequate compensation and no more and on the other hand the land owner should receive adequate compensation and no more and no less than adequate compensation. He should not be in the position of having an advantage of taking condemnor's money, which represents the subject matter of the litigation when condemnor enters into possession, and then take his chance before

a jury or a court of getting more or having the amount reduced and then putting the condemnor in the position of having a general judgment without any security or assurance that he will collect. In this we believe that due process has been denied, because the land owner has absolute assurance that he will get whatever is finally adjudged to be the value of the land taken, but the condemnor has only the right to a general judgment for any excess deposit withdrawn and no certainty of collecting the judgment.

CONCLUSION

WHEREFORE, your Petitioner respectfully prays that this application for writ of certiorari to the Supreme Court of Texas be granted and that the judgment of the state court be reversed and for such other and further relief to which Petitioner shall be justly entitled.

Respectfully submitted,

H. P. KUCERA,
402 City Hall,
Dallas, Texas,
City Attorney of the City of Dallas,
Counsel for Petitioner.

Of Counsel:
SCURRY, SCURRY & PACE,
Mercantile National Bank Building,
Dallas, Texas.

APPENDIX

Revised 1925 Texas Civil Statutes
Art. 3266. 6507-28 General Provisions, Sects. 6 and 7

6. If either party be dissatisfied with the decision, such party may within ten days after the same has been filed with the county judge file his objection thereto in writing, setting forth the grounds of his objection, and thereupon the adverse party shall be cited and the cause shall be tried and determined as in other civil causes in the county court.

7. If no objections to the decision are filed within ten (10) days, the County Judge shall cause said decision to be recorded in the minutes of the County Court, and shall make the same the judgment of the court and issue the necessary process to enforce the same. As amended, Acts 1941, 47th Leg., p. 872, ch. 543, § 1.

Article 1, Section 17 of the Constitution of the State of Texas

Sec. 17. No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities, shall be made; but all privileges and franchises granted by the Legislature, or created under its authority shall be subject to the control thereof.